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JURISDICTIONAL STATEMENT

The respondent accepts the jurisdictional statement of the relator and further acknowledges that this Court has previously accepted jurisdiction over this case.

STATEMENT OF FACTS

The relator's statement of facts is accurate as given. Additional information not provided concerns the physical aspects of the courtrooms in the 44th Judicial Circuit and the lack of any centralized filing in this circuit.

All of the courthouses in the 44th Circuit have only one courtroom that is suitable for a jury trial. Wright County has a large courtroom for jury trials, and a smaller courtroom that is only suitable for bench trials. Douglas County has a similar arrangement and Ozark County has only one courtroom.

Local Rule 7.3 places the requirement that all requests for jury trials be certified to the Division 1 Circuit Clerk with the case file transferred and the Associate Judge transferring same being assigned to remain with the case. (Relator's Exhibit A14). This rule has been in effect since December 21, 2000 and is presumably for the purpose of avoiding trial conflicts by having two different clerks' offices dealing with jury trials when only one courtroom is available.

The issues presented appear to be one of first impression and no cases have been found that are on point. The cases cited by the relator are equally appropriate to the respondent's position and there is no dispute over the factual background. The basic question appears to be whether a defendant is entitled to a new judge when he requests a jury trial in those circuits that have a standing order requiring the case to be certified to Division I and the certifying Judge to follow the case.

In this case, the relator appeared in Court by summons on January 13, 2004, at which time a plea of not guilty was entered. The matter was set for trial for February 24, 2004. (*Relator's Exhibits A-9 and A-10*). Subpoenas were requested by the State on January 16, 2004 and all returns were filed on January 23, 2004. (*id*).

The public defender's office requested a copy of the Court file, which was faxed to that office on January 28, 2004. On February 2, 2004, relator's attorney filed his entry of appearance. Two weeks later, on February 19, 2004 he requested a continuance from the trial, which was denied on the next day, four days from the trial setting. On February 20, the same day the request for continuance was denied, relator requested a jury trial, causing the case to be certified to Division I. (*Relator's Exhibits A-9 and A-10*) Since the respondent was required to follow the case by operation of local rule 7.3, there was no formal assignment or reassignment of the case to respondent by the Presiding Judge.

RESPONDENT'S RESPONSE TO POINTS RELIED ON

I.

Neither a Writ of Prohibition or Mandamus should be issued requiring the respondent to grant a change of judge in this cause, because the application for a change of judge following a request for a jury trial was untimely, in that standing order Local Rule 7.3 required that the case be transferred to Division I from Division II, and that the respondent follow the case and remain the trial judge and more than ten days had lapsed since the designation of a judge.

Local Rule 7.3

Supreme Court Rule 32.07

II.

Neither a Writ of Prohibition nor Mandamus should be issued compelling the respondent to grant a change of judge, because the respondent's interpretation of Local Rule 7.3 as not constituting a new appointment of a trial judge for the purpose of computing the time to file an application for change of judge is correct, in that the rule is a standing order and does not unduly create a burden on the relator, and if such a writ were issued, it would create a special rule for change of judge that pertains only to the Circuits where jury trials are not held in Division II Courts or in those Circuits that do not have centralized filing systems.

Local Rule 7.3

RSMo. 543.210

Rule 32.07

RSMo. 478.245

RSMo. 478.240.2

ARGUMENT

Neither a Writ of Prohibition or Mandamus should be issued requiring the respondent to grant a change of judge in this cause, because the application for a change of judge following a request for a jury trial was untimely, in that standing order Local Rule 7.3 required that the case be transferred to Division I from Division II, and that the respondent follow the case and remain the trial judge and more than ten days had lapsed since the designation of a judge.

The respondent concedes that relator's statement and application of the law is correct; however, disagrees that the standing order of the Circuit that requires the officiating Judge over a misdemeanor case follow the case through a jury trial in Division I triggers allowing the defendant to disqualify the judge when all other time frames allowing this motion have expired.

Missouri Court Rules, Volume III, 2004 edition published by West shows that in addition to the 44th Circuit's requirement that misdemeanor jury requests be transferred to Division I with the certifying judge to continue officiating over the case, the 25th Circuit (composed of Texas, Maries, Phelps and Pulaski Counties) and the 30th Circuit (composed of Benton, Dallas, Hickory, Polk and Webster Counties) have similar standing order local rules. The 25th Circuit's rule 6.1.3

require that misdemeanor cases certified to the Circuit Court for trial by jury, "*shall be automatically assigned to the associate circuit judge who is presiding at the time of the request for certification.*" The 30th Circuit's rule VI requires that jury criminal cases "*shall be heard by the Associate Circuit Judge presiding over the action...*"

If the Court agrees with the relator's position that requesting a jury trial on a misdemeanor case in the 25th, 30th and 44th Judicial Circuits grants an inherent right to a change of judge, even though the time has expired under the general rule for requesting a change of judge, we will have forty two judicial circuits that are limited to the time frames set forth in Rule 32.07, i.e. *...within ten days of the designation of the trial judge...* and three circuits that allow an additional change of judge by requesting a jury trial.

The relator's stance creates another method of delay in the three judicial circuits set forth above. The facts in this case more than strongly indicate that the purpose of requesting a jury trial was made only for the purpose of delay. The relator's attorney only requested the jury trial after the Court denied his request for a continuance, made four days before the bench trial was scheduled to commence. The request for a jury trial was then made the same day the request for continuance was denied. ***(Relator's Exhibits A-9 and A-10)***

Neither a Writ of Prohibition nor Mandamus should be issued compelling the respondent to grant a change of judge, because the respondent's interpretation of Local Rule 7.3 as not constituting a new appointment of a trial judge for the purpose of computing the time to file an application for change of judge is correct, in that the rule is a standing order and does not unduly create a burden on the relator, and if such a writ were issued, it would create a special rule for change of judge that pertains only to the Circuits where jury trials are not held in Division II Courts or in those Circuits that do not have centralized filing systems.

The question as to whether Local Rule 7.3 is valid can be answered affirmatively. RSMo. 478.245 allows a Circuit Court to adopt a local rule which provide: *(1) Cases or classes of cases that may or shall be assigned to particular divisions of the circuit court;* Here, all jury trials are assigned to the Division I Circuit Court. RSMo. 543.210 statutorily allows Associate Circuit Judges to hear jury trials, so the reassignment of the Associate Circuit Judge to hear the case certified to Division I does not run afoul of any prohibitions imposed by Rule or Statute. The Local Rule is also in harmony with RSMo. 478.240.2, which authorizes the Presiding Judge to assign Associate Circuit Judges to hear and determine cases.

Local Rule 7.3 does not conflict with Rule 32.07. Paragraph (b) authorizes a change of judge under the following circumstances ...*If the designation of the trial judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the trial judge or prior to commencement of any proceedings on the record, whichever is earlier.*

Local Rule 7.3 is a standing order and has been effective since December 21, 2000. When a request for a jury trial is made, defense counsel is aware beforehand that the Associate Circuit Judge will stay with the case.

The relator's theory concerning the effect of this particular rule is that it should be used to create a substantive right for defendants to disqualify the judge when a jury trial is requested on a misdemeanor case. This right will only exist in the three judicial circuits that have the rule that requires misdemeanor jury trials to be certified to the Division I Clerk and that the certifying judge be required to stay with the case.

If the relator had requested his misdemeanor jury trial in any of the forty-two other judicial circuits that do not have a similar local rule, the matter would have been simply scheduled for the trial and the same judge would sit in the case.

CONCLUSION

If the Court concludes that the local rules existing in the 25th, 30th and 44th Judicial Circuits that require applications for misdemeanor jury trial be certified to Division I and the certifying Judge to remain with the case are standing orders and not to be treated as new assignments, then relator's request should be denied. On the other hand, if the Court deems that these three Judicial Circuits' treatment of misdemeanor jury trials create an assignment of a new judge upon an application for a jury, then the relator's position is correct.

If the Court accepts the relator's arguments, the anticipated result will be an increase in the request for jury trials on misdemeanor cases when the defendant or his attorney desires to delay the proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify the foregoing brief was prepared using Microsoft Word in Times New Roman size 14 point font. Excluding the cover page, signature block, and the certificate of compliance, the brief contains 1,794 words which is within the limits proscribed by Rule 84.06 (b)(2).

The floppy disc filed with this brief contains a copy of the brief and has been scanned for viruses with McAfee Virus Scan and is free from any virus.

True copies of the brief and disc have been provided to Mr. Bob Brandon, counsel for the relator and the Hon. John Jacobs, Respondent by mailing same on this 5th day of October, 2004 via U.S. Mail, postage prepaid thereon.

Thomas W. Cline MBN 36590